In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 599

COUNTY OF WAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question in this case is whether Section 3466 of the Revised Statutes, 31 U.S.C. 191, gave the United States priority to assets of an insolvent taxpayer over the general tax lien of petitioner, which had not made its lien specific by taking possession of or title to the taxpayer's property.

The taxpayer, Midwest Steel Fabricators, executed in April 1961 a trust mortgage for the benefit of its creditors. The trustee wound up Midwest's business and liquidated its assets. After satisfying admittedly superior tax claims of the United States, a fund of some $4,800 remained. The United States asserted additional tax claims of $8,150 for which liens had arisen in February 1960, and in February and June 1961.

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Petitioner asserted its tax lien, for unpaid *ad valorem* personal property taxes of $197, which had arisen in December 1960.[1]

By amended complaint in an action first commenced to enforce its liens, the United States asserted its priority under Section 3466. Midwest's insolvency was conceded (Pet. 22). Therefore the district court held (Pet. 25), on the United States' motion for summary judgment, that the federal debt was superior under the part of Section 3466 which provides, "[w]henever any person indebted to the United States is insolvent * * * debts due to the United States shall be first satisfied * * *" (Pet. 21–22). The court of appeals affirmed *per curiam* (Pet. 17–18).

The result below is required by the prior decisions of this Court. There is no conflict of decisions or other occasion for further review.

Petitioner's arguments are in substance indistinguishable from those this Court considered and rejected in *United States* v. *Gilbert Associates*, 345 U.S. 361. There a New Hampshire town had a general lien on all the property of an insolvent taxpayer by reason of an assessment of *ad valorem* personal property taxes. The State Supreme Court had held, 97 N.H. 411, 90 A. 2d 499, that the State-created liens were superior to subsequently filed federal tax liens because the State-

[1] Other State taxing authorities, including those filing an *amicus curiae* brief in support of the present petition for certiorari, asserted additional claims totalling nearly $7,700. All of these claims were admittedly junior to the claims of United States and petitioner, and neither the *amici* nor any other junior lien holder claimed a right to recover. See the brief of *amicus curiae* at p. 4.

created interest needed no further judicial action to effect possession, which could have been, but was not, obtained by warrant. This Court, in reversing, first noted that it "has never actually held" that "specific" State-created liens are superior to the priority that Section 3466 gives to debts due the United States to the property of an insolvent taxpayer. This Court then went on to rule that the New Hampshire town in no event had a sufficiently specific lien to overcome the United States' priority under Section 3466 (345 U.S. at 365–366):

> * * * the Town * * * was the holder of a general lien on all the taxpayer's property. * * *
>
> In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim [to priority under Section 3466] against property no longer in the possession of the debtor. *Thelusson* v. *Smith*, 2 Wheat. 396. Until such possession, it remains a general lien. * * * The taxpayer had not been divested by the Town of either title or possession. The Town, therefore, had only a general, unperfected lien. *United States* v. *Waddill Co., supra; Illinois* v. *Campbell*, 329 U.S. 362, 370. Where the lien of the Town and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States. *United States* v. *Texas*, 314 U.S. 480, 488.

See also *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *United States* v. *Waddill Co.*,

323 U.S. 353; *Illinois* v. *Campbell*, 329 U.S. 362; *United States* v. *New Britain*, 347 U.S. 81; *United States* v. *Vermont*, 377 U.S. 351; *United States* v. *Equitable Life*, 384 U.S. 323.[2]

Petitioner's lien interest is the same as the New Hampshire town had in *Gilbert Associates*. Thus petitioner argues, as it must (Pet. 8–9), that *Gilbert Associates* should be overruled. As the cases cited above show, however, *Gilbert Associates* was merely an application to the particular facts of a well-settled principle. Petitioner has not shown that this line of authority is wrong; and if any change is warranted in the priorities of Section 3466, as so interpreted, it is a matter for Congress and not this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH KOVNER,
EDWARD LEE ROGERS,
Attorney.

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[2] Contrary to the contention of *amicus curiae* (Br. 5; see also Pet. 5, 9), the 1943 decision by the Michigan Supreme Court in *In re Ever Krisp Food Products Co.*, 307 Mich. 182, 11 N. W. 2d 852, that Section 3466 does not give federal tax debts priority over the type of liens involved here, is not a basis for review of the instant case, as it antedates this Court's decision in *Gilbert Associates*.

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